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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

JULIAN BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Seventh Circuit**

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## INDEX


| | Page |
|---|---|
| Prayer | 1 |
| Opinion below | 1 |
| Jurisdiction | 2 |
| Constitutional, statutory and regulatory provisions involved | 2 |
| Questions presented | 3 |
| Statement of the case | 5 |
| Opinion of the Court of Appeals | 6 |
| The case | 11 |
| Hearing on motion to vacate and reduce | 14 |
| Reasons for granting of writ | 16 |
| Conclusion | 20 |
| Appendix A—Opinion of Court of Appeals for the Sixth Circuit | A-1 |
| Appendix B—Presentence report | A-6 |


### Cases Cited


| | |
|---|---|
| Baker v. United States, 388 F. 2d 931 (4th Cir. 1968) | 6, 16, 18 |
| In re Murchison, 349 U. S. 133 | 20 |
| Marano v. United States, 374 F. 2d 583 (1st Cir., 1967) | 8 |
| Offutt v. United States, 348 U. S. 11, 14 | 19 |

Townsend v. Burke, 334 U. S. 736 (1948) ..... 6, 7, 13, 16, 17, 18, 19

United States v. Ginsburg, 98 F. 2d 52 (3rd Cir., 1968) ..... 6, 16

United States v. Maroney, 355 F. 2d 302 (3rd Cir., 1966) ..... 18

United States v. Myers, 374 F. 2d 707 (3rd Cir., 1967) ..... 6, 8, 16

## Statutes and Rules Cited

Constitution of the United States:

Fifth Amendment ..... 2, 4, 5

Sixth Amendment ..... 2, 5

Federal Rules of Criminal Procedure, Rule 35 ..... 3, 13

Federal Rules of Appellate Procedure, Rule 40 ..... 2

Rules of the Supreme Court of the United States, Rule 22(2) ..... 2

28 U. S. C., § 1254(1) ..... 2

28 U. S. C., § 7201 ..... 2, 4, 9, 15, 16

28 U. S. C., § 7206(1) ..... 3, 4, 15, 16

## Texts Cited

Dillard, "The Spirit of Liberty," 3rd Edition, N. Y., Alfred A. Knopf 1960 ..... 5

81 Cong. Rec. 2814-2815 (1937) ..... 16

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**To the United States Court of Appeals for the Seventh Circuit**

The Petitioner respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Seventh Circuit. The judgment became final on August 4, 1970.

### OPINION BELOW

The opinion is not yet reported and is set forth in full as Appendix A.

## JURISDICTION

The opinion and order was filed by the Court of Appeals on July 14, 1970. A timely Petition for Rehearing, under Rule 40, Federal Rules of Appellate Procedure, was filed on July 25, 1970. It was denied on August 4, 1970.

This petition is made under **28 U. S. C., § 1254(1)** and pursuant to **Rule 22(2)**, Rules of the Supreme Court of the United States, and is filed within the prescribed 30 days after denial of our Petition for Rehearing.

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

### Constitution of the United States

**Fifth Amendment.**

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

**Sixth Amendment.**

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him, . . ."

### United States Code

**28 U. S. C., § 7201.**

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, . . ., be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years or both, together with the costs of prosecution."

**28 U. S. C., § 7206(1).**

"Any person who—

(1) **Declaration under penalties of perjury.**—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

**Rule 35, Federal Rules of Criminal Procedure.**

**"Correction or Reduction of Sentence."**

"The court may correct an illegal sentence at any time and may correct a sentence imposed in any illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order of judgment of the Supreme Court denying review of, or having the effect of upholding a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law."

## QUESTIONS PRESENTED

The questions can best be stated by a brief introductory statement.

1) Petitioner (defendant-appellant below) was indicted on an eight count indictment. Counts 1 through 4 charges

violations of 28 U. S. C., § 7201 for each of the years 1959 through 1962. Counts 5 through 8 charged violations of 28 U. S. C., § 7206(1) for the same years.

2) The Government, in exchange for guilty pleas under the 28 U. S. C., § 7206(1) counts, caused 28 U. S. C., § 7201 counts 1 through 4 to be dismissed.

3) On the basis of a presentence investigation and report: Petitioner was fined $3,000 on Counts 5, 6 and 7 and was fined $5,000 and sentenced to three years imprisonment on Count 8. The relative severity of the sentences were unrelated to the gravity of the offense shown on the face of the indictments.

4) The presentence report made no findings suggesting harsh sentences other than the nature and the gravity of the offense. Appended to the presentence report were excerpts from the schedules, recommendations and conclusions of the pre-indictment Internal Revenue Service investigation.

5) References and exhibits in the presentence report related solely to the dismissed 28 U. S. C., § 7201 counts 1 through 4 and were misleading as to the 28 U. S. C., § 7206(1) counts upon which Petitioner was punished.

The questions are:

1

Where a legal sentence is imposed upon erroneous or misleading information contained in a presentence report; or where it is likely that sentence was imposed on that basis; has such sentencing procedure denied to the Petitioner, his rights secured under the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

Where a legal sentence is imposed on the basis of a presentence report containing erroneous or irrelevant or misleading statements and conclusions; and where the Petitioner was denied the opportunity to inspect the entire Internal Revenue report from which the misleading information was obtained and also was denied the opportunity to confront, cross-examine and controvert the implications before the District Court at the time of sentencing; has the Petitioner been denied rights secured to him under the Fifth and Sixth Amendments to the Constitution of the United States?

## STATEMENT OF THE CASE

In 1942 Judge Learned Hand, in discussing the contribution of an independent judiciary[1] asserted that—"(t)here are two ways in which judges may forfeit their independence, if they do not abstain. If they are intransigent but honest, they will be curbed; but a worse fate will befall them if they learn to trim their sails to the prevailing winds. A society whose judges have taught it to expect complaisance will exact complaisance; and complaisance under the pretense of interpretation is rottenness. If judges are to kill this thing they love, let them do it, not like cowards with a kiss, but like brave men with a sword."

Whether Judge Hand's statement here is appropriate is outweighed by its relevance to the misleading statement of the case reflected by the opinion of the Court of Appeals. The Seventh Circuit treats the matter as a mere fact

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[1] "The contribution of an Independent Judiciary to Civilization", speech by Judge Learned Hand, 250th Anniversary of The Supreme Judicial Court of Massachusetts, 11 21 42, reproduced, Dillard, "The Spirit of Liberty", 3rd Edition, N. Y. Alfred A. Knopf 1960, pages 155, 163-164.

question, i. e.; was the district judge misled by the erroneous and extensively distortive matter contained in the presentence report? From this the Court of Appeals concluded that he was not because the defendant failed to prove that he was.

Hence, the Statement of the Case first requires a demonstration that the Court of Appeals did not state it, and as erroneously stated, the result does not reflect a decision of the important constitutional issues involved or decides them wrong.

## OPINION OF THE COURT OF APPEALS

Petitioner's contentions are grounded on principles that the Court of Appeals refused to discuss or even recognize. As a consequence, it has decided this case "in conflict with (the) applicable decisions of this Court" in **Townsend v. Burke**, 334 U. S. 736 (1948), and "in conflict with the decision(s) of another court of appeals on the same matter." **Baker v. United States**, 388 F. 2d 931 (4th Cir. 1968); **United States v. Ginzburg**, 98 F. 2d 52 (3rd Cir., 1968); **United States v. Myers**, 374 F. 2d. 767 (3rd Cir., 1967).

Petitioner's (called defendant or Brown) contention is stated on the first page of his Brief in the Court of Appeals as follows:

> "The central issue focuses upon the propriety . . . of a criminal sentence order upon patently incorrect factual information. In this case the incorrect facts were contained in the presentence investigation report of the federal probation officer. . . . Necessarily embodied in this issue is defendant's guarantees of Due Process and confrontation protected by the Fifth and Sixth Amendments to the Constitution of the United States."

At the outset of his argument, in his Court of Appeals Brief, defendant states his premise, viz:

> "In **Baker v. United States**, 388 F. 2d 931, 933 (4th Cir., 1968) the opinion states:
>
> > 'In **Townsend v. Burke**, 334 U. S. 736, the pronouncement of sentence on information extensively and materially false, where defendant is not afforded an opportunity to correct or controvert this erroneous basis of punishment, was held to render the proceedings lacking of due process.' "

And his Brief and Argument concluded quoting **Townsend v. Burke**, 334 U. S. 736, as follows:

> "We would make it clear that we are not reaching this result because of petitioner's allegations that his sentence was unduly severe. . . . It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the carelessness or designed pronouncement of sentence on a foundation so extensively and materially false . . . that renders the proceedings lacking in due process."

The Respondent's (called Government) Brief took the tack adopted by the Court of Appeals, i. e., as stated at page 14 of its Brief:

> "The sentences imposed by the district court were well within the statutory maximum. In fact, the sentence . . . is a lenient one. The district court could have imposed on each of the four counts a fine of $5,000.00 and a jail sentence of three years. If made to run consecutively the sentences could have been fines totaling $20,000 and jail sentences totaling 12 years. . . . If the sentence imposed is within the statutory limits it will not be disturbed. (citations) Furthermore, a ruling on a motion for reduction of

a sentence under Rule 35 . . . is within the sound discretion of the district court."

Again in his Reply Brief, defendant emphasized that his contention was not that the sentences were illegal, but that his legal (statutory maximum) sentences were imposed under constitutionally impermissible conditions. At Reply Brief, p. 15, defendant again quoted from **United States v. Myers**, 374 F. 2d 707, 711 (3rd Cir. 1967), as follows:

> "The second ground advanced, that the sentencing judge may not have given significant weight to these erroneous facts . . . is an assumption specifically forbidden by the Supreme Court in the **Townsend** case [344 U. S. 740]:
>
> > 'We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving.'."

In addition, at page 21, the defendant relied upon one of the Government's cited authorities, **Marano v. United States**, 374 F. 2d 583, 586 (1st Cir., 1967), to remove the confusion of issue. He stated: "In the language of the opinion, the principle is as follows:

> "'The question of sentence is normally within the exclusive determination of the district court. In the exceptional situation, **where it is evident that the district court has given substantial consideration to legally impermissible factors, correction must be possible.** United States v. Wiley, 7 Cir. 1960, 278 F. 2d 500.' (Emphasis added.)"

As close as the opinion of the Court of Appeals comes to stating the case appears in the third paragraph, viz.: "Defendant alleges that the harshness of the sentence was predicated upon patently incorrect factual informa-

tion contained in the presentence investigation report. As a result . . . defendant contends that the guarantees of due process and confrontation . . . were violated. Specifically, defendant points to the content and exhibits of the report which allegedly[2] related only to Counts 1 through 4. Counts 1 through 4 charged defendant with violations (Income tax evasion under 26 U. S. C., § 7201) supported by the net worth investigatory method, while . . . counts 5 through 8 were predicated upon specific item omissions from gross income. Defendant claims[3] that neither he nor his counsel had knowledge of these incorrect facts until after the sentences were imposed. It is contended that the trial court's alleged[4] reliance on the information in the presentence report which related to the first four counts in the indictment, which . . . were dismissed, had the effect of denying defendant his rights under both the Fifth and Sixth Amendments."

But the remainder of the opinion is logically unrelated to both the legal and factual issue so raised.

The main discussion asserts that "(c)ontrary to defendant's contention that there was no meeting of the minds as to the context in which the term 'net worth' was used" has nothing to do with the constitutional problems now with any contention made by defendant.[5] In

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[2] There is no "allegedly" about it. The record is undisputed in this regard.

[3] The time-sequence shown by the record makes defendant's lack of knowledge a conclusive fact.

[4] Apparent (not actual) reliance is the basis of our Due Process issue.

[5] This was singled out from defendant's statement of fact (Br. 21-22). As used in the statement of fact, it followed a quote of the district court's "state(ment) for the record the considerations . . . indulged in in imposing sentence" (R. 130-131) and was intended to merely clarify what the opinion quotes and emphasizes therefrom.

addition, the due process issue is not resolved by judicial *ipse dixit*.

Nor does the opinion's assertion that "(d)efendant's further contentions are of little merit and can be dealt with briefly dispose of the constitutional problems presented by this case. The "contentions . . . dealt with briefly" are as follows:

1) Defendant was afforded "adequate opportunity to be heard" because he was given a copy of the presentence report though "in the Southern District of Illinois it is not the trial court's usual practice to supply presentence probation reports to defendants." [7 Cir. Opinion, footnote 4.]

2) Defendant, without knowledge of the presentence information before the court, "was allowed to present evidence by way of mitigation before sentencing."

3) At the later hearing on motion to reduce, defendant and his accountant Kempf, were permitted to testify.[6]

4) All sentences "were within the maximum penalties provided for violations of 26 U. S. C., § 7206(1). Under Rule 35, a ruling on a motion for reduction is within the sound discretion of the district court.

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[6] After the Court read a lengthy statement in re: reasons for the punishment and concluding with "I think I was quite lenient . . . but I am willing to hear you on the point now, Mr. Cassidy, if you would like to be heard" [R. 131]. Defendant's testimony was "heard" as exemplified by this objection and ruling:

"Mr. Violanti (U. S. Atty.): . . . "I am going to object . . . he persists in his plea of guilty (and) all we are hearing now is him saying he is not . . . he told [this Court on May 8, 1969 'I am guilty on Counts 5, 6, 7 and 8.' Now he is saying he told a lie at that time . . ."

"The Court: This gentleman has rambled on here about his exemplary life . . . the objection is sustained" [R. 142-143].

5) "The trial court had before it the presentence report" and therefore the defendant's rights were not violated.

## The Case

On May 8, 1969 defendant pled guilty to Counts 5, 6, 7 and 8. A presentence investigation and report was ordered.

The sentencing hearing was held on August 25, 1969.

The sentences imposed were each as follows:

Count 5

$3,000.00 fine and 3 years probation.

Count 6

$3,000.00 fine and 3 years probation.

Count 7

$3,000.00 fine and 3 years probation.

Count 8

$5,000.00 fine and defendant "sentenced to the custody of the Attorney General for a period of three years with the provision that defendant be confined to a jail type institution for a period of 3 months, and after the completion of said 3 month period, the execution of the remainder of the sentence be suspended, and defendant placed on probation for a period of 3 years thereafter . . ."[7] [R. 17-18].

Prior to imposition of sentences, the district court stated, *inter alia*, as follows:

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[7] The Court concluded sentencing thusly:

"Total fines of $14,000 and costs of $35.00 to be paid within the first 90 days of probation" [R. 18].

"It is most frequent that the person found guilty of a charge of this kind is known and recognized as an otherwise exemplary citizen. * * * In view of your otherwise exemplary record of responsibility and productive citizenship, Mr. Brown, the Court will provide that you be confined in a jail-type institution for a period of three months . . ." [R. 54-55].

The presentence report emphasized the "Offense" [App. B]. At the outset it states that the indictment charges "Julian Brown evaded income tax totaling $82,630.92 (See Exhibit A)." Exhibit A, is an I. R. S. "Summary-Taxable Income" computed by Arnold S. Kabacker, Technical Advisor. It relates solely to the dismissed "Evasion" counts 1 through 4. Page 2 of the report is called "Details of the Offense." It commences

"The offenses in this case relate to the evasion of income tax by Julian Brown in the years 1959 through 1962."

The entire content concerns the dismissed Counts 1 through 4, and further states, *inter alia*:

"This case began as a 'net-worth' case. The Internal Revenue Service determined that the income Julian Brown reported in the years 1959 through 1962 was not sufficient for him to acquire the increase of $182,499.71 in his net worth in that period (See Exhibit C).[5] * * * It is the opinion of the Agent that since the net worth has been determined . . . any additional deductions for expenditures or liabilities would have to result in corresponding increases in unreported income or assets . . . **Counts Five through Eight of the indictment are some specific examples**

[5] Exhibit C is a starkly bold accounting conclusion with no foundation whatsoever.

**which account for part of the increase in Brown's net worth"**[9] (Emphasis added).

This section of the report concludes:

> "A section of the investigative report states Facts Relating to Intent and Conclusions and Recommendations of the Agent. This section is attached (See Exhibit E)."

Exhibit E covers 2½ single-spaced typewritten pages [See Exhibit E, Appendix B]. They contain wholly unsupported conclusions, made by an unidentified hearsay source, from unidentified existent or non-existent fact, and were highly prejudicial to a determination of defendant's punishment.

Subsequently, defendant filed his motion to vacate and reduce sentences under **Rule 35, Federal Rules of Criminal Procedure.**[10] The motion does not assert that the sentences were illegal; but requests the correction of legal sentences imposed in an illegal manner. Summarized, the motion to vacate, asserted as follows:

> 1) The sentences were imposed on the basis of a presentence report containing patently incorrect and misleading information.

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[9] An assertion by the Court that defendant's plea to 5 through 8 merely corroborated the "opinion of the Agent" in re Counts 1 through 4. An inter-relationship that no rational mind could ignore—even though the corroborated accusation was dismissed. The $96,900.00 in unreported deductions patently demonstrates the erroneous information supplied by the Agent's assertion of "some specific examples which account for part of the increase in Brown's net worth." It also demonstrates a fatal defect in the Government's "net-worth" case.

[10] In its opinion the Court of Appeals states: "On appeal defendant contends that he should receive merely a fine and not a jail sentence." That is not so! Whatever its effect, our contention is that sentences cannot result from patently erroneous information consistent with the Fifth and Sixth Amendments. The refusal of the Court of Appeals to discuss or even recognize our reliance on **Townsend v. Burke**, 334 U. S. 736, indicates it drew this issue narrower than that which was presented.

2) Defendant could not have known of these erroneous and misleading facts until after sentences were imposed and the hearing concluded.

3) The district court's exposure to and apparent reliance on the irrelevant, distortive, misleading, and hearsay conclusions of unknown IRS agents, has denied defendant of rights secured to him under the Fifth and Sixth Amendments to the Constitution of the United States.

The presentence report was made a part of the record by making it an exhibit to our motion to vacate and reduce.[1]

## Hearing on Motion to Vacate and Reduce

Hearing on defendant's motion was held on October 10, 1969.

At the outset the District Judge made a statement, *inter alia*, as follows:

> "I would like to state for the record the considerations . . . indulged in in imposing sentence . . . They were the presentence report . . . to the extent that the report showed that this man had no prior criminal record of any kind. **As a matter of fact, other than this offense [he] had led quite an exemplary life as a responsible citizen in this community and that in the process of so doing he had amassed a rather substantial present net worth. I did not consider in any**

[1] The Court of Appeals implied that since we were not entitled to the presentence report we were precluded from relying on its erroneous content, viz.: ". . . the record shows that defendant . . . was given more information than required with regard to his sentence." This statement was footnoted 4. "During oral argument . . . counsel for the Government stated that in the Southern District of Illinois it is not the trial court's usual practice to supply presentence probation reports to defendants. Defendant Brown, however, was given a copy of the report at his request . . ."

way now that net worth might or might not have been accumulated. I did not consider in any way that fact that there were counts 1, 2, 3 and 4 in this indictment[12] which the United States Attorney had previously told me he intended to dismiss . . . I did consider two facts in the presentence report which seem to me beyond doubt disclose that there was very clear intention to confuse or mislead others with respect to his financial records. Those were the facts that two personal bank accounts had been maintained, one or the other of which had not been disclosed to the bookkeeper who prepared data for income tax returns and the fact that in the course of that type of manipulation, on one or more occasion this defendant drew checks to a fictitious person who was in fact himself and cashed those checks" [R. 131-132].

Exhibit E to the presentence report, items (2), (3), (6) and (9) under "Facts Relating to Intent", are the unsupported conclusions of an unidentified source, and the basis for the District Court's knowledge.

Assuming some rational standard for the punishments imposed, the only other measure for gravity of offense, is the total amounts omitted as asserted in the indictments. Analysis on this basis demonstrates that the heaviest sentence (1962) was predicated on Count 4 rather than Count 8.

| Year | Counts 26 U. S. C., § 7201 | | Counts 26 U.S. C., § 7206(1) | | Sentence |
|---|---|---|---|---|---|
| 1959 | (1) | $48,344.80 | (5) | $ 3,826.57 | $3,000 |
| 1960 | (2) | 16,572.55 | (6) | 3,878.74 | 3,000 |
| 1961 | (3) | 29,357.59 | (7) | 81,255.45 | 3,000 |
| 1962 | (4) | 78,514.00 | (8) | 44,713.32 | 5,000 and 3 Yrs. |

[12] This emphasized language is quoted in the opinion of the Court of Appeals.

All logic requires the acceptance that the district judge at least appears to have been misled, by "a foundation so extensively and materially false . . . that renders the proceedings lacking in due process."

## REASONS FOR GRANTING OF WRIT

As previously stated, the judgment of the Court of Appeals contradicts controlling decisions of the Supreme Court: **Townsend v. Burke**, 334 U. S. 736; and applicable decisions of other Courts of Appeal: **Baker v. United States**, 388 F. 2d 931 (4th Cir., 1968); **United States v. Ginzburg**, 398 F. 2d 52 (3rd Cir., 1968); **United States v. Myers**, 374 F. 2d 707 (3rd Cir., 1967).

This is an appropriate case for the Court to exercise its certiorari jurisdiction. The factors involved raise issues directly within "(t)he function of the Supreme Court . . . to resolve conflicts of opinion on federal questions that have arisen among lower courts to pass upon questions of wide import under the constitution (and) laws . . . of the United States and to exercise supervisory power over lower federal courts." See: Chief Justice Hughes to Senator Wheeler, 3 23 37, 81 Cong. Rec. 2814-2815 (1937).

The probation officer obtained no information concerning the **26 U. S. C., § 7206(1)** charges in Counts 5 through 8 of the indictment. Indeed, the record clearly shows that the Internal Revenue Agent withheld such information while providing investigatory schedules, opinions, conclusions and accusations with regard to Counts 1 through 4. The only reference to the specific omissions constituting the relevant charges under **26 U. S. C., § 7206(1)**, was an "agent's" assertion that they partially accounted for and corroborated his circumstantial determination of a substantial understatement of taxable net income.

Hence, the case involves an element of official entrapment, not by the District Court or the Justice Department, but by information submitted through administrative agents, acting without supervision or authority. In essence, they did that which the Government agreed it could not do—submitted the Income Tax Evasion case directly to the Court for the purpose of influencing judicial action at the most sensitive juncture of any criminal proceeding, the imposition of punishment. As a result one of the major considerations for defendant's negotiated plea was destroyed. The specific transactions constituting omissions from gross income underlying Counts 5 through 8, permitted independent investigation and evidence of $96,900 of related deductible expense against real estate sales which could have been introduced in mitigation [R. 44-45]. On the other hand the circumstantial and conclusionary information submitted could not be defeated or impeached independently, without the specific information from which the suppositions were reached and without confrontation and cross-examination as to the methods used.

The Government's specific item schedule supporting Counts 5 through 8 omissions was delivered to defendant on May 8, 1968. It was never made available to the District Court. Consequently, defendant's mitigation evidence at the August 25, 1969 sentencing hearing was meaningless and prejudicial—defendant was unaware that it was unavailable to the judge and the judge was unaware that such an exhibit even existed. The District Court had every right to presume candid disclosure by the Internal Revenue Service and to therefore conclude that the information submitted were the facts underlying defendant's guilty pleas. They were not, and as a result the District Court imposed "sentence on a foundation so extensively and materially false . . . that renders the proceedings lacking in due process." **Townsend v. Burke**, 334 U. S. 736 (1948).

Among other things, it is implicit in the Seventh Circuit's opinion and order, that the defendant could not be heard to complain because: (1) his sentences were within the statutory maximums, and (2) he was not entitled to see the presentence report and, therefore, the illegal information it contained could not be the basis for any complaint. This latter proposition, in light of what the presentence report contains, directly raises the need for a uniform national policy with regard to a disclosure to defendant. Unless, this become the rule, uniform sentencing standards are non existent, and the degree of punishment may depend entirely upon the Circuit involved and its rule with regard to affording the defendant an opportunity to show error before judgment is made.

The problem was recognized in **United States v. Maroney**, 355 F. 2d 302, 310 (3rd Cir., 1966). At footnote 10 that Court said:

> "There is increasing uneasiness regarding the existing rule that the presentence report need not be made known to the defendant who might be able to show factual errors."

In **Baker v. United States**, 388 F. 2d 931 (3rd Cir., 1968), Circuit Judge Winter (concurring) expressed the same concern. At 388 F. 2d page 935:

> "I think that a presentence report should be fully disclosed to a defendant . . . prior to sentencing, except for the confidential recommendation of the probation officer to the sentencing judge and except where there is tangible good cause to withhold . . . . a portion of the report."

In footnote 1, Judge Winter referred to **Townsend v. Burke** and concluded: "How can a due process guarantee against a sentence predicated on misinformation be viable, and not rendered meaningless if the defendant has no way

of determining that the sentencing judge was misadvised?"

The same conclusion is just as realistic where sentences are imposed before the content of the report is known. Particularly where, as here, the Due Process requirements of the Fifth Amendment and the confrontation guaranty of the Sixth Amendment, are defeated on appeal by the determination that defendant failed to prove that the district judge relied upon or was influenced thereby.

This case also involves the supervisory power of this Court in another sense. Particularly if the erroneous content of the presentence report is not disclosed. In those statutory "malum prohibitum" crimes initiated by investigatory agencies of federal government, the agencies must be discouraged from second-guessing and disagreeing with the Department of Justice. In essence, that is what happened in this case, and this Court's supervisory power over federal agencies requires the granting of relief similar to that provided by the exclusionary rule of evidence.

Without regard to the legality of sentence, or its harshness or leniency, or whether the record establishes actual reliance by the sentencing judge, the mere existence of misleading ex parte information at this crucial and sensitive juncture of the criminal process constitutes a denial of due process of law. To borrow from this Court, in another context: "These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice." **Offutt v. United States**, 348 U. S. 11, 14.

**Townsend v. Burke**, 334 U. S. 736 (1948) brings sentencing and the circumstances here under the Due Process Clause of the Fifth Amendment to the Constitution of the United States. **Townsend** also states, tacitly if not expressly, the rule that erroneous and misleading informa-

tion is what due process proscribes—therefore, the mere appearance or possibility that sentence may have been so influenced violates defendant's federal constitutional rights.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. * * * Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' **Offutt v. United States**, 348 U. S. 11, 14.".
>
> In re Murchison, 349 U. S. 133, 136-137.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted

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# APPENDIX.

## APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

September Term, 1969 — April Session, 1970

No. 18081
United States of America,
Plaintiff-Appellee,
v.
Julian Brown,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division

July 14, 1970

Before FAIRCHILD and PELL, *Circuit Judges*, and ESCHBACH, *District Judge*.[1]

ESCHBACH, *District Judge*. Defendant-appellant Julian Brown pleaded guilty to four counts of an eight-count indictment[2] for wilfully and knowingly subscribing to joint

[1] Judge Eschbach of the United States District Court, Northern District of Indiana, is sitting by designation.

[2] The indictment charged defendant with violations of 26 U. S. C., § 7201 in Counts 1 through 4 for intentionally understating taxable net income for the years 1959, 1960, 1961, and 1962, in the gross amount of $172,788.33. Pursuant to a negotiated plea, the Government dismissed Counts 1 through 4 in exchange for defendant's guilty plea to Counts 5 through 8 based on violations of 26 U. S. C., § 7206(1).

returns which he did not believe to be true and correct as to every material matter for the taxable years 1959, 1960, 1961, and 1962, in violation of 26 U. S. C., § 7206(1). Defendant Brown was sentenced to a fine in the amount of $3,000 on Counts 5, 6, and 7 and to a fine in the amount of $5,000 and imprisonment for three years on Count 8. Pursuant to 18 U. S. C., § 3651, the three-year sentence under Count 8 was suspended on the condition that defendant serve ninety days in a jail-type institution and that defendant be placed on probation for the remainder of the period. On appeal, defendant contends that he should receive merely a fine and not a jail sentence, the trial court having improperly denied his motion under Rule 35 of the Federal Rules of Criminal Procedure to reduce the sentence. We affirm.

The trial court ordered a presentence investigation after the Government agreed to dismiss Counts 1 through 4 for violation of 26 U. S. C., § 7201, and defendant Brown agreed to plead guilty to the lesser Counts 5 through 8 for violation of 26 U. S. C., § 7206(1). Defendant was sentenced on August 25, 1969. Subsequent to the sentencing, defendant requested and received a copy of the presentence investigation report. Defendant then filed a motion under Rule 35 of the Federal Rules of Criminal Procedure to reduce the sentences as to Counts 5, 6, and 8.[3] After a hearing on the motion on October 10, 1969 during which defendant and his independent accountant testified, the trial court denied the motion.

Defendant alleges that the harshness of the sentence was predicated upon patently incorrect factual information contained in the presentence investigation report. As a result of this improper sentencing, defendant contends that the guarantees of due process and confrontation pro-

[3] Defendant also moved under Rule 32 to withdraw his guilty plea, but later abandoned that motion.

fected by the Fifth and Sixth Amendments were violated. Specifically, defendant points to the content and exhibits of the report which allegedly related only to Counts 1 through 4. Counts 1 through 4 charged defendant with violations supported by the net worth investigatory method, while defendant alleges that Counts 5 through 8 were predicated upon specific item omissions from gross income. Defendant claims that neither he nor his counsel had knowledge of these incorrect facts until after the sentences were imposed. It is contended that the trial court's alleged reliance on information in the presentence report which related to the first four counts in the indictment, which counts were dismissed, had the effect of denying defendant his rights under both the Fifth and Sixth Amendments.

Contrary to defendant's contention that there was no meeting of the minds as to the context in which the term "net worth" was used in the process of sentencing, we think that the trial court's use of that term was unambiguous and clear. The court made a statement with regard to the factors which it considered, including the presentence report, lack of any prior criminal record, defendant's duplicity of bank accounts, and checks drawn by defendant to a fictitious person. The court used the term "net worth" in the context of defendant's general success and affluence in his community, not with regard to the "net worth" method of proof used in Counts 1 through 4. During the hearing on October 10, 1969, the trial judge explained his use of the term "net worth":

> As a matter of fact, other than this offense [he] had led quite an exemplary life as a responsible citizen in this community and that in the process of so doing he had amassed a rather substantial present *net worth. I did not consider in any way how that net worth might or might not have been accumulated.* I did not

> consider in any way that fact that there were counts 1, 2, 3 and 4 in this indictment. . . . (Emphasis added.)

The trial court called to defendant's attention that he was considering net worth as a factor in the imposition of fines.

Defendant's further contentions are of little merit and can be dealt with briefly. We do not agree with defendant that he was deprived of any constitutional rights under the Fifth and Sixth Amendments. Instead, the record shows that defendant was given adequate opportunity to be heard and was given more information than required with regard to his sentences.[1] On August 25, 1969, defendant appeared before the trial court and was allowed to present evidence by way of mitigation before sentencing; also present were defendant's attorney and accountant as well as the attorney representing him in the business transactions for the years in question. A hearing was held on October 10, 1969 on a motion to reduce the sentences and a motion to withdraw the guilty plea, which was abandoned. During that hearing, defendant was again given the opportunity to be heard, and both defendant Brown and Kenneth Kempf, Brown's accountant, testified.

Defendant does not contend that the guilty pleas were not entered in conformity with Rule 11 of the Federal Rules of Criminal Procedure, that he is not guilty under Counts 5 through 8, or that the sentence is ambiguous. Furthermore, the sentences under all counts were within the maximum penalties provided for violations of 26 U. S. C., § 7206(1). Under Rule 35, a ruling on a motion for reduction of a sentence is within the sound discretion of

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[1] During oral argument on appeal, counsel for the Government stated that in the Southern District of Illinois it is not the trial court's usual practice to supply presentence probation reports to defendants. Defendant Brown, however, was given a copy of the report at his request, excluding the recommendation of the probation officer.

the district court. *Zaffarano v. Blackwell*, 383 F.2d 719 (5th Cir. 1967). The trial court had before it the presentence report as well as testimony by and on behalf of defendant Brown. All of defendant's rights were adequately protected.

The judgment of the district court is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

## APPENDIX B

Probation Form 2a

Feb. 65

United States District Court
Southern District of Illinois
Northern Division

PRESENTENCE REPORT

Name: Julian Brown.

Address: 2135 West Sunnyview Drive, Peoria, Illinois.

Legal Residence: Same.

Age: 52.

Date of Birth: 6/7/17.

Sex: Male.

Race: White.

Citizenship: United States.

Education: Tenth Grade.

Marital Status: Married.

Dependents: One (Wife).

Soc. Sec. No.: 328-07-1521.

FBI No.:

Detainers or Charges Pending: None.

Codefendants (Disposition): None.

Date: August 5, 1969.

Docket No.: 4093.

Offense: Income Tax Evasion, Title 26, Sec. 7201—4 counts. Subscribing to a False Return, Title 26, Sec. 7206(1)—4 counts, United States Code.

Penalty: Counts 1 through 4, $10,000 and/or 5 years; Counts 5 through 8, $5,000 and/or 3 years.

Plea: Counts 1 through 4—Not Guilty; Counts 5 through 8—Guilty.

Verdict: Counts 1 through 4—Pending; Counts 5 through 8—Guilty.

Custody: Own Recognizance Bond ($5,000).

U. S. Atty.: Richard E. Eagleton.

Defense Counsel: John E. Cassidy, Jr., Peoria, Illinois (retained).

Disposition: § 3651, Tit. 18.

Date:

Sentencing Judge: Robert D. Morgan.

RE: BROWN, Julian
DOB: 6/7/17

OFFENSE:

**Official Version.** On March 31, 1966 an eight-count indictment was returned and filed in the United States District Court for the Southern District of Illinois charging Julian Brown in Counts One through Four with violation of Section 7201, Title 26, United States Code—Income Tax Evasion and charging him in Counts Five through Eight with violation of Section 7206(1), Title 26, United States Code—Subscribing to a False Return.

In Counts One through Four the Indictment charges that in the years 1959 through 1962, Julian Brown evaded income tax totaling $82,630.92 (See Exhibit A.)

In Counts Five through Eight, the Indictment charges that Julian Brown subscribed to false returns for the years 1959 through 1962. These counts charge that Brown failed to list items of reportable income totaling $133,674.08. (See Exhibit B.)

On April 1, 1966 the defendant appeared before the U. S. Commissioner at Peoria, Illinois and was released on $5,000 Recognizance Bond. On April 20, 1966 Mr. Brown entered a plea of not guilty to all counts. He again appeared in U. S. District Court at Peoria, Illinois on May 8, 1969. He withdrew his plea of not guilty to Counts Five, Six, Seven, and Eight and entered a plea of guilty to those counts. A presentence investigation was ordered by the Court and Mr. Brown was released on a $5,000 Recognizance Bond. The U. S. Attorney stated he would move for dismissal of Counts One, Two, Three, and Four after sentence is pronounced on Counts Five, Six, Seven, and Eight.

DETAILS OF THE OFFENSE:

The offenses in this case relate to the evasion of income tax by Julian Brown in the years 1959 through 1962. The investigating agent advised that his investigation covered returns for the years 1943 through 1962 with particular emphasis on the years 1957 through 1962.

This case began as a "net worth" case. The Internal Revenue Service determined that the income Julian Brown reported in the years 1959 through 1962 was not sufficient for him to acquire the increase of $182,499.71 in his net worth in that same period (See Exhibit C). The Internal Revenue Agent stated that in determining Brown's net worth, the accountant considered every expenditure which Brown made known to him. All known bank accounts were checked. The net worth was based only on items which were paid for during the given year.

It is the opinion of the Agent that since the net worth has been determined from the taxpayer's records of assets, income, expenditures, and liabilities; any additional deductions for expenditures or liabilities would have to result in corresponding increases in unreported income or assets. The items of unreported income set out in Counts Five through Eight of the Indictment are some specific examples which account for part of the increase in Brown's net worth.

Brown told investigating agents that by 1957 he had saved $75,000.00 in a safety deposit box. He said he had not received any money from inheritances, trust funds, or insurance policies. A computation of funds available to Mr. Brown as of December 31, 1956 shows that he should have had a minus net worth of $9,275.61. This figure was determined by computing maximum income and minimum expenditure for the years 1933 through 1956 based on income tax returns and based on personal exemption allowance in each year (See Exhibit D).

A section of the investigative report states Facts Relating to Intent and Conclusions and Recommendations of the Agent. This section is attached (See Exhibit E).

DEFENDANT'S VERSION OF THE OFFENSE:

At the time of interview with the Probation Officer on May 8, 1969, Mr. Brown said he had no knowledge of this offense until the Internal Revenue Service pointed out that some real estate sales had not been recorded in his books. Mr. Brown said he was surprised to hear this because it was not intentional. He said he had never knowingly done anything wrong in his entire life.

It should be noted that during an interview on November 27, 1963, Mr. Brown admitted to the Internal Revenue Agent that in 1957 and 1958 he wrote checks payable to

a Ray Larson and charged some of these checks to rent expense in connection with his seat cover business. Checks in Brown's records totaled $3,250.00 in 1957 and $3,575.00 in 1958. Brown admitted that he made all of these checks payable to Ray Larson, cashed them himself, and kept the money. He said he was very sorry about it and it was the only mistake he made.

Defense counsel, John E. Cassidy, Jr., has advised the Probation Officer that at the hearing on the motion for probation, he plans to make a statement and produce information in mitigation. Mr. Cassidy said he will show that although Mr. Brown failed to list items of reportable income, he also failed to list substantial amounts of legitimate deductions. Mr. Cassidy stated that he will show that the difference between the amount of tax paid and the amount actually due is considerably less than what is alleged by the Government. Mr. Cassidy said he will show that the circumstances in this case do not demonstrate a designed evasion pattern and that the defendant did not intend to defraud the Government.

It is the defendant's contention that when he went into the real estate development business the first year was very confusing. Things happened very fast and it was all new to him. He had one accountant who handled the books for his personal business and another accounting firm handled the books for the corporation. In 1962 he got organized better and thereby eliminated the circumstances which caused or allowed these offenses.

PRIOR RECORD:

The defendant has no known prior record.

FAMILY HISTORY:

**Defendant.** Julian Brown was born Julius Brownstein in Lipton, Saskatchewan, Canada on June 7, 1917. On

May 17, 1948 at Peoria, Illinois his name was changed to Julian Brown. The defendant and his brother both advised that family relationships have always been good. Julian Brown has been described as very cooperative and a hard worker. He lived with his parents until he was married at age 25.

**Parents and Siblings.**

**Father.** David Brownstein died at age 48.

**Mother.** Jennie Brownstein died in 1956 at age 68.

**Brother.** Maury Brown, age 61, lives at 900 Fon Du Lac Drive, East Peoria, Illinois. He is the owner and operator of Brown's Home and Auto Store, 416 South Adams Street, Peoria, Illinois.

**Sister.** Edith (Mrs. Harry) Schatz, age 47, lives at 4028 Brookridge Drive, Peoria, Illinois. She is a housewife.

MARITAL HISTORY:

The defendant married Minnie Finkelstein at Peoria, Illinois on June 7, 1942. This is the first marriage for each of them and the marriage is intact. There are no known marital problems. Mrs. Brown's mother has recently come to live with them.

**Children:**

**Daughter.** Deborah (Mrs. Lester) Liby, age 25, lives with her husband on Cherry Creek Drive, Homewood, Illinois.

**Daughter.** Myrna Brown, age 23, lives at 426 Surf Street, Chicago, Illinois. She is employed at the office of a stock broker.

HOME AND NEIGHBORHOOD:

Mr. Brown said that he came to the United States from Canada when he was five years old. He has lived in the Peoria, Illinois area since 1933. He has recently moved to 2135 West Sunnyview Drive, Peoria, Illinois. He stated that he paid $46,300 for this four bedroom home.

EDUCATION:

Mr. Brown attended Central High School in Peoria, Illinois. He left after the tenth grade in 1934. He said that his brother was the sole support of the family so he quit school to go to work.

RELIGION:

Mr. Brown is a member of the Aguda's Achim Temple, 3616 North Sheridan Road, Peoria, Illinois. Julius Hyatt is the Rabbi.

INTERESTS AND LEISURE-TIME ACTIVITIES:

Mr. Brown states that he has been director of the Oriental Band of the Mohammed Shrine Temple in Peoria, Illinois for the past several years. He said that this position is one of the most important things in his life. Mr. Henry Clark from the Temple stated if Mr. Brown is sentenced for a criminal offense, he will be excluded from the Lodge.

HEALTH:

**Physical.** Julian Brown is a 52 year old white male who is 5 feet 6 inches tall and weighs 150 pounds. He has blue eyes and greying dark hair. Mr. Brown said his general health is good. He has no handicaps. At the age of eight, he was hit by a truck and it required 40 stitches to close

the wound in his forehead. He has had no other serious illnesses or injuries.

**Mental and Emotional.** Mr. Brown has had no psychiatric examinations or assistance. There is no apparent need for such assistance at this time.

EMPLOYMENT:

After leaving school in 1934 he began working for his brother at Brown Auto Supply, Peoria, and remained there until 1942 at which time he went into the seat cover and auto supply business for himself in Pekin, Illinois. He continued operating this business in Pekin until 1951 at which time he moved to 613 Main Street, Peoria (this address was formerly 631 Main until changed in 1955) and began doing business as the Sure-fit Seat Cover Center and Midwest Auto Supply. He continued operating this business as a sole proprietorship until January 1961 at which time he sold a one-half interest to Mr. Herman Finkelstein and they subsequently formed a partnership under the name of "Seat Cover Center" at 613 Main Street, Peoria, Illinois. Mr. Brown continued his association in this partnership until it was dissolved in 1963.

In July 1958 Mr. Brown and Mr. Hyman Harrison organized a corporation known as Brown and Harrison, Inc. This corporation was formed to purchase certain land, subdivide such land and sell lots. Mr. Brown was elected president, his wife, Minnie, was elected vice-president and Hyman Harrison was the secretary-treasurer. In November 1960 Mr. Brown became engaged in the contracting business and in 1961 and 1962 built and sold homes constructed primarily in the Brown and Harrison, Inc. subdivision, Morton, Illinois.

Mr. Brown has continued in the business of building and selling homes. He now operates under the name of

Julian Brown and Associates, Inc. At this time he is working in conjunction with a Peoria contractor, Robert F. Blume.

MILITARY SERVICE:

The defendant has never been in military service. His brother stated this was due to flat feet.

FINANCIAL CONDITION:

The defendant's attorney stated he will provide a financial statement. This statement will be attached to this report (see Exhibit F). A Net Worth Statement in December, 1962 showed Mr. Brown's Net Worth as $435,319.59.

STATEMENTS OF OTHERS:

Calvin R. Stone, Circuit Judge, Peoria, Illinois, was given as a reference by this defendant. Judge Stone advised that he has known Julian Brown since 1958 when Brown and Harrison went into business. He was contacted by Mr. Brown to act as attorney for Brown and Harrison. This was prior to his election as Circuit Judge.

Judge Stone said that he did not associate with Mr. Brown socially and knew him only in a business relationship. He said that when Brown and Harrison went into business, Brown knew nothing about real estate, contracts, construction, etc. He was not a practical man and had to learn as he went along. Judge Stone did not think that Brown set up a scheme to defraud the Government. He felt that Brown was probably overwhelmed by business in a new area and he did a sloppy business of maintaining records. Judge Stone added that as a businessman, Brown

always tried to satisfy the complaints of the buyers. On questions of contracts and procedures, Brown always instructed his attorney to do things the way they should be done, whether the advantage was to the buyer or to himself.

The income tax returns were not prepared by Judge Stone and he was not involved in handling the present case. He said that based upon his dealings with Mr. Brown, he would have to give him a glowing recommendation.

EVALUATIVE SUMMARY:

Julian Brown is a 52 year old white male who has entered a plea of guilty to four counts of Subscribing to a False Income Tax Return. The indictment charges in these four counts that he failed to list income totaling $133,674.08. The other four counts of the indictment allege that he evaded income tax in the amount of $82,630.92.

The defendant states that his omissions of income were not intentional. He has no prior record and he has a good reputation in the community. He has operated his own business most of his life and is presently engaged in the business of building and selling homes.

Family relationships have always been good and he is presently living with his wife and mother-in-law. Mr. Brown has no problems regarding his health, his family, or his financial condition.

The most recent financial information indicates that Mr. Brown's net worth is in excess of $400,000.00.

EXHIBIT "A"

MW-E-773

**Julian Brown, et ux.**

**Summary**

**Taxable Income**

| Year | Return | Additional | Corrected |
|---|---|---|---|
| 1959 | $ 4,847.42(1) | $ 48,344.08(1) | $ 53,191.50(1)) |
| | | | 49,791.50 ) |
| 1960 | 2,623.08(1) | 16,572.55(1) | 19,195.63(1)( |
| | | | 15,795.63 ( |
| 1961 | 8,654.65 | 29,357.59 | 38,012.24 |
| 1962 | 20,228.82 | 78,514.11 | 98,742.93 |
| Total | $36,353.97 | $172,788.33 | $209,142.30 |

(1) Adjusted Gross Income.

**Income Tax**

| Year | Return | Additional | Corrected |
|---|---|---|---|
| 1959 | $ 389.00 | $ 19,787.99 | $ 20,176.99 |
| 1960 | None | 3,858.69 | 3,858.69 |
| 1961 | 1,850.21 | 11,616.28 | 13,466.49 |
| 1962 | 5,303.24 | 47,367.96 | 52,671.20 |
| Total | $ 7,542.45 | $ 82,630.92 | $ 90,173.37 |

Computations by:

Arnold S. Kabaker
Technical Advisor

## EXHIBIT "B"

### Omitted Income
### 1959-1962

| | Count V 1959 | Count VI 1960 | Count VII 1961 | Count VIII 1962 |
|---|---|---|---|---|
| (1) Interest & Dividends | $3,295.88 | $3,338.74 | $ 5,391.25 | $ 2,603.32 |
| (2) Rental Income | 530.69 | 540.00 | 270.00 | 810.00 |
| (3) Sale of Anti Freeze | | | 1,474.20 | |
| (4) Property Sales | | | 74,120.00 | 41,300.00 |
| Total | $3,826.57 | $3,878.74 | $81,255.45 | $44,713.32 |

Total of Omitted Income 1959-1962 ..... $133,674.08

## EXHIBIT "C"

**37-41-014-1-1**

12. Check stubs for checking account of Julian and Minnie Brown at the Commercial National Bank and the Sheridan Village Bank.

13. Bank statements and cancelled checks for a/c of Julian and Minnie Brown at the First National Bank for period December 1960—January 3, 1963, inclusive.

Mr. Brown's books and records as maintained by Kenneth Kumpf were reconciled by Internal Revenue Agent Rush with the income reported on the income tax return filed for each year 1957-1962, inclusive. The schedules relating to the reconciliation have been retained in the work papers on this case.

In view of Mr. Brown's extensive investments in real estate properties, in the stock of, and advances to, Brown

and Harrison, Inc. and the omission from his records of the income received from the sales of certain houses; dividend income from savings and loan associations; interest from certain contracts for deeds and rental income, his corrected income has been determined on the basis of increases in net worth, plus personal expenditures.

Appendices A and B are detailed statements of the taxpayer's net worth and expenditures, together with brief descriptions of the evidence, the names of the witnesses and reference to related exhibits. Appendix A relates to taxpayer's net worth from the starting point, December 31, 1956, to December 31, 1958. Appendix B, which relates to the years included in the recommendation for prosecution, namely 1959 through 1962, is summarized as follows:

| Particulars | 1959 | 1960 | 1961 | 1962 |
|---|---|---|---|---|
| Assets: | | | | |
| Cash on hand or on deposit | $ 7,147.29 | $ 23,059.09 | $ 51,215.56 | $ 95,432.71 |
| Real Estate | 74,897.00 | 74,897.00 | 65,097.00 | 65,097.00 |
| Investment in unsold houses | | | 44,808.09 | 153,932.66 |
| Other assets | 274,703.45 | 237,219.22 | 258,917.57 | 185,140.51 |
| Totals | $356,747.74 | $335,175.31 | $420,038.22 | $499,602.88 |
| Liabilities | $103,927.86 | $ 44,328.35 | $ 85,045.68 | $ 64,283.29 |
| Net Worth | $252,819.88 | $290,846.96 | $334,992.54 | $435,319.59 |
| Increase in Net Worth | $ 42,279.13 | $ 38,027.08 | $ 44,145.58 | $100,327.05 |
| Adjustments | 10,912.37 | (18,831.45) | (1,837.25) | 2,997.35 |
| Corrected Adjusted Gross Income | $ 53,191.50 | $ 19,195.63 | $ 42,308.33 | $103,324.40 |
| Reported Adjusted Gross Income | $ 4,847.42 | $ 2,623.08 | $ 12,950.74 | $ 24,810.29 |

## EXHIBIT "D"

**37-41-014-1-1**

A computation of funds available to Mr. Brown as of 12-31-56 is as follows:

| | | |
|---|---|---|
| **Amounts received 1933-1956:** | | |
| Per schedule (Page 12) ..... | | $177,018.65 |
| Accounts and Notes Payable | | 8,879.42 |
| Reserve for depreciation 12-31-56 ..... | | 7,445.84 |
| Total Available ..... | | $193,343.91 |
| **Expenditures 1933-1956, inclusive:** | | |
| Estimated living expenses (per schedule Page 14) ..... | $39,550.00 | |
| Income tax paid ..... | 31,168.28 | |
| Real Estate purchased: | | |
| 1023 West Virginia ..... | 9,800.00 | |
| 815 S. W. Jefferson ..... | 35,000.00 | |
| 605 Westwood ..... | 45,097.00 | |
| Inventory—Midwest Auto ... | 13,962.40 | |
| Machinery & Equipment .... | 3,244.98 | |
| Accounts Receivable— Midwest Auto ..... | 16,779.85 | |
| Automobile ..... | 3,525.00 | |
| House furnishings ..... | 4,492.01 | |
| Total Expenditures ..... | | $202,619.52 |
| Available funds 12-31-56 .... | | $(9,275.61) |

The following schedule is in support of amounts shown on the above computation relating to living expenses for years 1933-1956, inclusive. Amounts were determined on the basis of personal exemption allowance in each year as provided by the Internal Revenue Code.

| Year | No. of Exemptions | Allowance for Each Exemption | Other Information |
|---|---|---|---|
| 1933 | 1 | $1,000.00) | |
| 1934 | 1 | 1,000.00) | Form 899 shows no record of return filed prior to 1943 |
| 1935 | 1 | 1,000.00) | |
| 1936 | 1 | 1,000.00) | |
| 1937 | 1 | 1,000.00) | |
| 1938 | 1 | 1,000.00) | |
| 1939 | 1 | 1,000.00) | |
| 1940 | 1 | 800.00) | |
| 1941 | 1 | 750.00 | Mr. Brown war married 6-7-42 |
| 1942 | 2 | 1,200.00 | |
| | | | |
| Sub-total carried forward | | $9,750.00 | |

EXHIBIT "E"

37-41-014-1-1 -

During the same interview on April 23, 1964 when it was pointed out that the sale of property on Lot 10 in Brown & Harrison, Inc. Subdivision was not reported in his records, he stated (Exhibit 3, A. 269): "It wasn't reported? No, I can't figure out why it wasn't reported, Paul. I know the first year was a real mess because it was all together new business for me."

**Chief's Conference**

In a letter dated March 16, 1965, the Chief, Intelligence Division, invited Julian Brown to an informal conference on this case to be held on March 24, 1965, at Room 325,

Land of Lincoln Building, 325 West Adams, Springfield, Illinois at 1:00 p. m. (Exhibit 303).

Mr. Brown did not appear; however, his attorney, Mr. John E. Cassidy, Jr., appeared and stated, in substance, that he had no facts or circumstances to present at this time and that if he later finds any, he will present them in the meeting with the Regional Counsel's office, if the case goes that far (Exhibit 304).

## Facts Relating to Intent

The following facts and circumstances, which are set forth in detail in the preceding sections of this report, bear on Mr. Brown's intent in failing to report a substantial part of his income:

(1) The gross discrepancy between Brown's reported income and the increases in his net worth for the years 1957 through 1962.

(2) Mr. Brown concealed the sale of certain real estate by using more than one bank to deposit the proceeds of such sales even after he had been advised by his accountant to deposit all sales in one bank.

(3) Mr. Brown's failure to inform his accountant of sales of real estate, the income of which was deposited in other banks.

(4) Discrepancies in excess of 500% between the corrected taxable income and the reported taxable income for the years 1957 through 1962 strongly evidences an intent to evade tax, thereby defrauding the government.

(5) Mr. Brown attempted to conceal and cover up his unreported income by stating that the expenditures for part of the property and for part of the

building business came from $75,000.00 he had in a safety deposit box.

(6) Mr. Brown's failure to inform his accountant of interest income from savings accounts, income from rental properties, and interest income from contracts for deed.

(7) Mr. Brown's use of cashier's checks, and expenditures of large amounts of currency, in connection with his real estate business and in relation to his investments in Brown and Harrison, Inc. and other assets.

(8) Mr. Brown attempted to conceal and cover up the source of certain monies he loaned to Brown and Harrison, Inc. by causing accounts to be set up on the corporation's books which would show that the Corporation received the money from other persons.

(9) Mr. Brown's failure to maintain adequate records of his real estate business thereby causing his accountant to be unaware of additional income.

(10) Mr. Brown caused and assisted in the preparing of false financial statements in which was shown unsupported cash in safety deposit box of $75,000 on 12-31-57 and excluded assets of over $130,000.00 on 12-31-62.

(11) Mr. Brown attempted to conceal his sales and his investment in real estate properties in the Brown-Harrison, Inc. Subdivisions, Morton, by constructing houses on lots held in the name of Brown & Harrison, Inc., thereby permitting him to hold or to transfer title of the property to the buyer without his name being connected with the sale.

(12) Mr. Brown's mode of living during the years 1959-1962, i. e., he lived in a $45,000.00 house in an "exclusive" area; he drove expensive cars—1960 Olds-

mobile and 1962-63 Plymouth Convertible; he paid off personal loans totaling $37,442.86 and he increased his cash in banks in an amount approximating $90,000.00, all of which indicate that he knew his income was greater than he reported during this period.

**Conclusions and Recommendations**

The recommendation for prosecution is based on a determination of the taxpayer's increase in taxable income which was determined on the basis of increases in his net worth and non-deductible personal expenditures which disclosed that he failed to report approximately 85% of taxable income for the years 1957 through 1962. The use of the net worth method of computing income is justified by Mr. Brown's failure to maintain adequate records of his seat cover business, his rental income and his real estate business. The evidence corroborating the starting point December 31, 1956, includes Mr. Brown's admissions relative to his financial history and the reconstruction of the income which he received between the years 1932 and 1956 based on information obtained from District Director as regards his filing record.

Mr. Brown had available all of the necessary records and related information which he could have furnished to his accountant to file correct income tax returns. However he wilfully and with the intent to defraud the Government signed and filed income tax returns he knew to be false by omitting certain taxable income which he received in each of the years 1959 through 1962. The statements made by Mr. Brown that he had $75,000.00 cash in a safety deposit box at the end of 1957 has been adequately nullified by the analysis of income available to Mr. Brown and the amount he expended in the years between 1932 and 1956. Mr. Brown stated, "No, No" to the question, "Have you or any member of your own family, that would

be your wife or children, ever received any inheritances", and nothing was found to indicate that he received any non-taxable inheritances or gifts. All amounts known to have been received by Mr. Brown in years prior to 1957 have been considered in the determination of the beginning net worth.

It is believed that the evidence relating to the starting point for the net worth determination, as summarized hereinbefore, and the evidence of Brown's wilful intent as outlined in the section relating to intent are sufficient for use in criminal proceedings. The flagrancy of the violation is shown in discrepancies of more than 500% between the corrected taxable income and the taxable income which Mr. Brown reported for the years 1957 through 1962. Nothing was found that indicated that the credibility of any witness would be challenged.

I recommend, therefore, that Mr. Julian Brown, Peoria, Illinois, be prosecuted for the willful attempt to evade a part of his income tax for each of the years 1959 through 1962, in violation of Section 7201, and for willfully subscribing to returns filed for each year 1959 through 1962, under the penalties of perjury, with the knowledge that they were not true and correct as to every material matter in violation of Section 7206(1), Internal Revenue Code for 1954.

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 649

JULIAN BROWN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner was indicted on an eight-count indictment, of which four counts charged willful attempts to evade his federal income tax for the years 1959 through 1962, in violation of Section 7201 of the Internal Revenue Code, and four counts charged willful making and subscribing of false tax returns for each of those years, in violation of Section 7206 (1) of the Code (Pet. App. 1, 7-8). Pursuant to a negotiated plea, petitioner pleaded guilty to the Sec-

tion 7206(1) counts and, at the time of sentencing, the Section 7201 counts were dismissed (Pet. App. 1, 8). Petitioner was sentenced to $14,000 in fines on all counts and concurrent sentences of three years' probation on three counts; on the fourth count, he received a three-year sentence to be suspended on the condition that he serve ninety days in a jail-type institution and thereafter be placed on probation for three years (Pet. 11). Each of the four violations carried a maximum penalty of a $5,000 fine and a three-year jail sentence. The court of appeals affirmed the judgment on July 14, 1970 (Pet. App. 1-5) and denied a petition for rehearing on August 4, 1970 (Pet. 2). The petition for a writ of certiorari was filed on September 4, 1970, and is out of time under Rule 22(2) of this Court.

Petitioner challenges the validity of his sentence, asserting that it was based on incorrect or misleading information in the pre-sentence report and relying on *Townsend* v. *Burke*, 334 U.S. 736; *Baker* v. *United States*, 388 F. 2d 931, 932-933 (C.A. 4); and *United States* v. *Myers*, 374 F. 2d 707 (C.A. 3). Petitioner contends that the report was prejudicially misleading because it contained information relating to the four dismissed tax evasion counts and opinion statements by the investigating Treasury agent. These matters were canvassed in connection with petitioner's motion for reduction of sentence in the district court, and there is no issue warranting plenary consideration in this Court.

After the hearing on the motion to reduce, the trial judge stated (Pet. 14-15) that in sentencing petition-

er, he had not considered the information relating to the dismissed evasion counts. And as to the attack upon the facts asserted in the Treasury agent's investigative report we note that petitioner had an opportunity at the Rule 35 hearing to present evidence refuting, or in mitigation of, the pre-sentence report, but did not do so.

In *Townsend* v. *Burke*, *supra*, *Baker* v. *United States*, *supra*, and *United States* v. *Myers*, *supra*, the courts vacated sentences grounded on mistaken information regarding the offender's past criminal record. In contrast, the trial judge below noted that petitioner had no prior criminal record (Pet. 14) and because of this moderated the sentence imposed on petitioner. *Townsend* and the line of decisions following it have no application to the present case. In truth, the petition attacks the severity of the petitioner's sentence, not the facts considered by the trial judge in assessing the sentence. As stated above, the trial judge relied on only designated portions of the pre-sentence report, the accuracy of which petitioner did not rebut. The trial judge acted well within the permissible range of his discretion in sentencing petitioner and subsequently refusing to alter that sentence. See, *e.g.*, *Zaffarano* v. *Blackwell*, 383 F. 2d 719, 721 (C.A. 5).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1970.

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